

C.B., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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Case Submitted on the Record

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

On November 24, 2014 appellant, through his representative, filed a timely appeal from June 18 and November 4, 2014 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

The issue is whether OWCP properly denied appellant's April 3 and August 8, 2014 requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

On October 31, 2013 appellant, then a 45-year-old tile and plate setter, filed an occupational disease claim alleging that he sustained a left shoulder condition as a result of

¹ 5 U.S.C. § 8101 *et seq.*

excessive repetitive motion in the performance of his duties. He first became aware of his condition and realized that it resulted from his employment on August 1, 2013. The employing establishment stated that appellant had been working light duty since July 17, 2012 due to a previously accepted lower back injury (File No. xxxxxx203).

In an October 25, 2013 statement, appellant reported that he had worked for the employing establishment since April 2001 as a tile setter. He injured his back at work and was let go in 2008. After appellant received treatment he returned to work as a tile setter until 2010 when the physical activity reagravated his back and pain injections no longer worked. He explained that shoulder pain was common in his job so it was normal for him to have issues with his shoulders. Appellant noted that in August 2013 his shoulder started to cause him great pain again. When he did not get better after two months he sought medical treatment. Appellant reported that he was diagnosed with extensive problems of the left shoulder and that it was explained to him that years of repetitive motion had damaged his shoulders. He related that both his physician and physical therapist told him that his injuries were caused by the excessive amount of repetitive motion involved in the tile setter trade. Appellant stated that he had no outside activities that involved repetitive use of his left arm and that he did not suffer any injuries after August 1, 2013.

Appellant submitted various office notes and reports by Gregory Howard Cain, MD, dated October 15 to November 20, 2013. In various office notes, he diagnosed shoulder impingement, scapular, and dyskinasis. In a November 20, 2013 report, Dr. Cain stated that appellant was disabled from work for six weeks due to a fracture of clavicle. He noted that appellant had restrictions of no lifting with left arm and may return to light lifting with gradual progression in early January 2014. In a November 20, 2013 e-mail, Dr. Cain informed appellant that a magnetic resonance imaging (MRI) scan revealed a small break at the end of his clavicle. He advised appellant that the acromioclavicular (AC) joint next to the break had some arthritis and swelling that was pushing down on his tendon.

By letter dated November 21, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested documents to establish the alleged employment factors and a diagnosed condition as a result of his employment.

Appellant submitted a position description for tile and plate setter and his March 26, 2001 functional placement examination by the employee health unit, which indicated that he met the functional requirements of the job listed.

Appellant submitted various employee health unit records and work limitation forms dated September 10, 2013 to January 14, 2014 by Dr. Mark A. Malakooti, Board-certified in public health and general preventive medicine, and Drs. Garrett W. Duckworth and Richard Spinach, physicians who specialize in occupational medicine. In these reports, the physicians noted appellant's complaints regarding his left shoulder and that he worked as a tile setter. They reported that appellant had been examined in order to extend his current work limitations. Appellant was diagnosed with chronic left shoulder pain, left shoulder impingement, and closed fracture of the clavicle distal third.

In reports dated November 27 and December 16, 2013, Mary E. Bethune, a certified physician assistant in occupational medicine, examined appellant for follow up of the left shoulder. She related that he worked as a tile setter and noted diagnoses of impingement syndrome of left shoulder, closed fracture of distal clavicle, and degenerative joint disease of shoulder. Ms. Bethune noted that appellant's strength, pain, and range of motion had improved. She observed that he still had decreased range of motion with overhead reaching or reaching behind the back. Ms. Bethune also noted tender left AC joint, distal clavicle and decreased range of motion in external rotation. She reported that a November 20, 2013 MRI scan revealed irregularity of the subarticular aspect of the clavicle consistent with a nondisplaced subarticular fracture. Dr. Bethune diagnosed left shoulder impingement syndrome and closed fracture of the clavicle. She advised appellant to return to modified duty.

In a December 1, 2013 statement, appellant reported that since September 2012 he had been on permanent restrictions for a chronic neck and back injury. He worked temporarily at an IT job which ended in September 2013. Appellant explained that he started feeling left shoulder discomfort on or around August 1, 2013. He reported that his tile setter activities were performed on a daily basis from February 2003 until September 2013 for 40-hour work weeks. Appellant noted that his hobbies included normal household chores such as doing laundry, carrying split firewood, riding a lawnmower, and taking care of the animals. He also rode a street motorcycle in nice weather about six times a year.

In a January 16, 2014 statement, Robin Jones, an Injured Worker Program Manager, stated that on July 17, 2012 appellant was assigned to the Injured Workers Program when it was determined that the employing establishment could no longer accommodate his temporary physical limitations due to his back condition. She noted that his physical limitations became permanent on September 13, 2012. Ms. Jones provided the various job assignments that appellant worked from July 2012 to the present with their descriptions and physical limitations.

In a decision dated February 5, 2014, OWCP denied appellant's claim finding insufficient medical evidence to establish causal relationship. It explained that none of the medical evidence established that his left shoulder was causally related to repetitive motion at work.

Following OWCP's denial, appellant submitted a January 14, 2014 duty status report by Dr. Gregory Gutke, Board-certified in preventive and occupational medicine, who indicated that appellant could work limited duty with restrictions of no pulling, pushing, grasping, or fine manipulation with the left arm. Dr. Gutke stated that appellant began to experience pain in his left shoulder starting at the end of July 2013 after working a tech job for one year.

Appellant submitted additional employee health unit records and work limitation forms dated February 3 to May 12, 2014 by Drs. Duckworth and Larry B. Smith, Board-certified in family medicine, for follow-up complaints with his left shoulder and request to extend his current work limitations. He was diagnosed with left shoulder pain and left shoulder impingement.

In a February 13, 2014 return to work note, Dr. Brad R. MacKinnon, a Board-certified family practitioner, indicated that appellant was disabled from work as of August 1, 2013. He

authorized appellant to return to work with limitations of no lifting with the left arm, no ladders, and no typing.

In reports dated March 4, 2014, Dr. James M.T. Garrity, Board-certified in preventive and occupational medicine, examined appellant for a left shoulder condition that had been symptomatic since August 1, 2013. He related that appellant had a claim, that had yet to be accepted, associated with his job as a tile setter which required intensive repetitive shoulder work for the past 13 years at the employing establishment. Dr. Garrity noted that appellant also suffered from chronic neck and back complaints. Upon examination, he observed asymmetry of the AC joints with the left more prominent and reduced range of motion in internal rotation. Dr. Garrity also noted minimal impingement. He diagnosed left shoulder sprain with rotator cuff impingement. Dr. Garrity stated that appellant had impingement in concert with scapulothoracic bursitis. He related that appellant did intensive shoulder work which included reaching above chest and shoulder and impact activities using chipping guns to bring up tile. Dr. Garrity explained that “without clear cause for [appellant’s] fracture, this is associated with micro trauma in athletes and the analogy would be made with some of the risk factors for shipyard welders that do shoulder intensive work.” He opined that appellant’s “shoulder intensive work as a tile setter to a degree of medical probability caused [appellant’s] impingement syndrome.”

On April 3, 2014 OWCP received appellant’s request for reconsideration.

By decision dated June 18, 2014, OWCP denied appellant’s April 3, 2014 reconsideration request finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the medical evidence submitted was not relevant to the issue of causal relationship.

On August 8, 2014 OWCP received appellant’s request for reconsideration. Appellant also resubmitted employee health unit records dated November 2013, a November 20, 2013 MRI scan report by Dr. Cain, and Dr. Garrity’s March 4 and July 17, 2014 report.

In June 12 and July 24, 2014 employee health unit reports, Dr. Larry B. Smick, an osteopathic physician specializing in preventative/occupational medicine, related appellant’s history of medical conditions and request to extend his work limitations due to his left shoulder condition. He authorized appellant to return to work with restrictions listed in the work limitation form.

In a July 15, 2014 report, Dr. Garrity examined appellant for follow up of shoulder complaints. Upon examination, he observed continued tenderness of the AC joint to palpation as well as dyskinesia and impingement on abduction to a mild degree and less on flexion. Dr. Garrity diagnosed left shoulder impingement syndrome. He noted that appellant worked as a tile setter from 2001 to 2008 and returned again in 2010 to 2012. Dr. Garrity related that appellant’s activities as a tile setter included being bent over, raising his arms and reaching out in above chest and above shoulder level postures, lifting tiles in boxes of 60 to 80 pounds onto his shoulders, and carrying them about the shipyard. He stated that it was “reasonable to state on a more likely than not basis that [appellant’s] left shoulder impingement syndrome is a work-related occupational disease arising directly out of his work as a tile setter that includes activities above his chest and shoulder level.” Dr. Garrity also reported that lifting heavy boxes above

chest level onto appellant's shoulder posed additional risk for shoulder impingement syndrome. He further noted that, although appellant had a period prior to reporting the injury and an interim during his work where he was not directly involved in tile setting, there was sufficient duration to attribute his shoulder condition to the workplace as a tile setter at the employing establishment.

In a July 17, 2014 report, Dr. Garrity noted his disagreement with OWCP's denial decision. He stated that there was a "sufficient body of published articles that indicate force, repetition, posture, and shoulder intensive activities consistent with that of a tile setter is causal on a more likely than not basis for [appellant's] left shoulder impingement syndrome." Dr. Garrity explained that this condition often resulted in bursitis and tendinitis with impingement. This was reasonably objectified on his examination. Dr. Garrity noted that appellant did have a break in his employment from the tile setter. He stated that appellant's:

"initiating work in 2001 to 2008 and then again from 2010 as a tile setter, where [appellant] was often kneeling, resting on an extremity above shoulder level, and working above chest and shoulder level with force, repetition, and these particular postures above chest and shoulder level that he has achieved sufficient medical evidence based on reported medical evidence already published that his condition is work related on a more likely than no basis."

In a decision dated November 4, 2014, OWCP again denied appellant's August 8, 2014 request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the medical evidence submitted was cumulative and substantially similar to the evidence previously submitted.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.² OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district Office.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

² 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

³ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁴ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

Along with his April 3, 2013 and August 8, 2014 reconsideration requests, appellant submitted new medical reports from Dr. Garrity dated March 4 to July 17, 2014. In the March 4, 2014 report, Dr. Garrity reviewed appellant's history of left shoulder condition, described his employment duties as a tile setter, and conducted an examination. He opined that appellant's "shoulder intensive work as a tile setter to a degree of medical probability caused his impingement syndrome." In reports dated July 15 and 17, 2014, Dr. Garrity provided findings on examination and diagnosed left shoulder impingement syndrome. He noted that appellant worked as a tile setter from 2001 to 2008, and returned again in 2010 to 2012. Dr. Garrity further described appellant's duties as a tile setter, which included being bent over, raising his arms and reaching above chest and above shoulder level postures, lifting tiles in boxes of 60 to 80 pounds onto his shoulders, and carrying them about the shipyard. He opined that appellant's left shoulder condition was "a work-related occupational disease arising directly out of [appellant's] work as a tile setter." Dr. Garrity further explained that, although appellant had a period prior to reporting the injury, and an interim period where he was not directly involved in tile setting, there was sufficient duration to attribute his shoulder condition to his work as a tile setter at the employing establishment.

The Board notes that Dr. Garrity's opinion directly addressed the grounds upon which OWCP denied appellant's occupational disease claim as it addressed the issue of causal relationship.⁸ In its February 5, 2014 decision, OWCP denied appellant's finding insufficient medical evidence to establish that he sustained a left shoulder condition causally related to his repetitive duties at work. In his medical reports, Dr. Garrity provides an accurate description of appellant's duties as a tile setter and an accurate history of his employment. He opines that appellant's work as a tile setter attributed to his shoulder condition. For these reasons, the Board finds that Dr. Garrity's reports constituted relevant and pertinent new evidence not previously considered by OWCP. As this meets one of the standards for obtaining a merit review of this case, the Board finds that OWCP improperly denied appellant's requests for reconsideration. Accordingly, appellant is entitled to a merit review.

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *See N.L.*, Docket No. 13-1763 (issued April 9, 2014).

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.⁹ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁰ The Board will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP failed to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 4 and June 18, 2014 decisions of the Office of Workers' Compensation Programs are remanded for further action consistent with this decision of the Board.

Issued: May 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).